IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CONTEMPT PETITION NO.30 OF 2006

AND

NOTICE OF MOTION NO.1060 OF 2007

IN

CONTEMPT NOTICE OF MOTION NO.1312 OF 1994

IN

SUIT NO.642 OF 1989

Krishna Murari Mathur ...Petitioner

v/s

Moiz A.H. Pardiwala and ors. ...Respondents

Mr Vicky Singh i/b M/s Thakordas and Madgaonkar for Petitioner.

Mr Venkatesh Dhond with Mr Ashish Panikkar, Mr Pankaj Sutar i/b M/s Khaitan and Jaykar for Respondent No.1.

CORAM : D.K. DESHMUKH J.

DATE : 26TH MARCH 2007.

P.C. :-

1. Suit No.642 of 1989 was filed by the petitioner Krishna Murari Mathur in this Court claiming that plaintiff, defendant No.1 who is respondent No.1 in the present petition, defendant No.2 who is respondent No.2 in the present petition and defendant No.3 who is respondent No.3 in the present petition, were carrying on business as partners in the name and style Business Associates and Computer Services under a deed of partnership. The plaintiff claimed a decree of declaration that the suit partnership firm shall stand dissolved from 20th December 1988 or such other date as this Court may deem fit and proper. The plaintiff also sought a decree declaring that several properties mentioned in the plaint are the assets of the firm, one of the property in relation to which decree of declaration was sought was Office No.1003, 10th Floor, Dalamal House, Nariman Point, Mumbai 400 021. In this suit, a notice of motion was taken out being notice of motion No.853 of 1989. By that notice of motion, appointment of Court Receiver was sought on the office premises at Dalamal House (hereinafter referred to as the said property). There was also a temporary injunction sought restraining defendant Nos.2 and 3 from alienating or disposing off the property. Notice of

motion No.853 of 1989 was disposed off by the Court by its order dated 4th August 1993. Perusal of that order shows that it was the case of the defendants that the said property is not the asset of the firm, but it is owned only by defendant Nos.2 and 3. after considering that contention, the Court prima facie found that the property is partnership asset and therefore made an order for appointment of Court Receiver on the property. When the Court Receiver appointed by the Court went to take possession of the asset of the firm, it was found that the property is in possession of a third party and that property was disposed off by the defendants even before this Court disposed off the notice of motion and appointed the Court Receiver. Therefore, notice of motion No.1312 of 1994 was taken out for initiating action against the defendants for deliberately misleading the Court and not informing the Court when the Court was hearing the notice of motion that the property was also transferred by them. By prayer clause (b), a direction was sought against the defendants to deposit an amount of Rs.59,01,000/- in the Court. That notice of motion remained pending for long time. Ultimately, it came before the Court for hearing on 22nd August 2005. It appears that in that motion, a reply was filed by the defendant No.1 dated 22nd August 2005. The defendant No.1 on his own behalf and on behalf of defendant Nos.2 and 3 filed an affidavit stating that

the defendant No.1 had informed his Advocate about sale of the property by agreement dated 17th April 1990 and vide conveyance dated 30th July 1990, however, inadvertently his Advocate failed to bring this fact to the notice of Court. He also tendered unconditional apology on behalf of the defendants to the Court. Notice of motion no.1312 of 1994 was disposed off by the Court by order dated 22nd August 2005. In paragraph 1 of the order, the Court narrates events that gave rise to the notice of motion. It is paragraphs 2 and 3 of that order which are relevant, which read as under :-

> "2. Learned counsel appearing for the defendants makes a statement that to show his bonafide that there is no deliberate attempt to commit contempt of the Court he is willing to deposit in this Court a sum of Rs.59.00 lacs within a period of 8 weeks from today. The amount to be deposited will be invested by the Prothonotary and Senior Master for a period of three years and renew the same from time to time till further orders. He also tenders an affidavit submitting an unconditional apology.
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> 3. In the light of the aforesaid position, I am of the opinion that an action in contempt

is not necessary. It is made clear that at the time of renewal of the said fixed deposit, the interest accrued thereon also will be reinvested in the said fixed deposit. The said fixed deposit will abide the final result of the suit. In the light of the aforesaid position, I do not propose to take action in contempt and dismiss the motion for the same.

No order as to costs."

. Perusal of the above quoted paragraphs shows that a statement was made by the Advocate appearing for defendants, to show his bonafides that there is no deliberate attempt to commit contempt of the Court, expressing his willingness to deposit an amount of Rs.59,00,000/- in Court within eight weeks. The Court, after recording that statement, in view of that statement, disposed off the notice of motion. The Court noted that unconditional apology has also been tendered. Against the order dated 22nd August 2005, an appeal was filed before the Division Bench. Perusal of the memorandum of appeal shows that the order dated 22nd August 2005 was challenged on several grounds. One of the grounds on which the order was challenged was ground No.(xix) which reads as under :-

"(xix) The learned Judge whilst passing the

impugned order put one of the appellants in the box and a direct question was put to him to the effect that if the amount was not paid he would be arrested. The aforesaid statement was therefore made under fear or arrest without application of mind and therefore the Appellants ought to be relieved of this statement."

. The appeal was disposed off by the Court by order dated 28th August 2006. The Court found that contempt motion was dismissed by the Court, hence the appeal was not maintainable and therefore, the appeal was disposed off. It appears that this contempt petition was filed while the appeal was pending. The Court by order dated 22nd September 2006 issued show cause notice as against respondent No.1 only. The Court by order dated 17th October 2006 declined to issue any show cause notice against respondent Nos.2 and 3 because they did not appear in Court on the relevant date. Thus, the present contempt petition is only against respondent No.1. This contempt petition, after show cause notice was issued was fixed before the Court on 22nd January 2007. The hearing of the matter was then adjourned. On 20th April 2007, notice of motion No.1060 of 2007 was taken out by the respondent No.1 praying for an order releasing the respondent No.1 from the

statement made on behalf of all the respondents through their Advocate recorded in paragraph 2 of the order dated 22nd August 2005 passed in notice of motion No.1312 of 1994. According to the averments made in paragraph 7 of this petition, undertaking was given to the Court which is recorded in the order dated 22nd August 2005, undertaking to deposit Rs.59,00,000/- within eight weeks from the date of the order. According to the petitioner, the respondent No.1 has deliberately failed to abide by his undertaking to deposit the amount as per his own statement and therefore is guilty of having committed civil contempt of the Court. According to the respondent No.1, he is entitled to be relieved from the statement which he has made through his Advocate which is recorded in the order dated 22nd August 2005 because according to him, the statement came to be made by him because he had panicked and in that state of mind, he instructed his lawyer to make that statement. According to the respondent No.1, the property belonged to the respondent Nos.2 and 3, it is they who had transferred the property, therefore, there was no question of the respondent No.1 being in any manner responsible either for transferring the property or for not disclosing that information to the Court and therefore, in no way the respondent No.1 was liable to deposit any amount in the Court. According to the respondent No.1, as the statement was made in

peculiar facts and circumstances, the respondent No.1 is entitled to be relieved from that statement. So far as the contempt petition is concerned, according to the respondent no.1, the statement recorded in the order dated 22nd August 2005 does not amount to an undertaking and therefore, the contempt petition does not lie for not abiding by the statement recorded in the order. It was also contended that the contempt petition proceeds on the basis that there is an order directing the respondent No.1 to deposit the amount of Rs.59,00,000/- and the respondent No.1 has committed breach of that order, it is submitted that there is no such order made by the Court and therefore, contempt petition should be dismissed.

2. I have heard learned counsel appearing for both the sides in detail. After having heard the leaned counsel for both the sides in detail and after going through the record, I find that the record discloses a very disturbing state of affairs. The respondent No.1 has opted to blame his lawyer for everything and he is changing his version from time to time. Perusal of the order dated 22nd August 2005 shows that the statement was made to the Court by the Advocate appearing for respondent No.1 and other respondents but the title of the order shows that the Advocate was appearing only for respondent No.1. Perusal of the order also shows that

because of the statement made, which was recorded by the Court, the Court dropped the contempt proceeding and did not take any action against other respondents. Perusal of the provisions of section 19 of the Contempt of Courts Act shows that appeals are provided only against an order convicting a person of contempt. Clearly therefore, an appeal was not maintainable but still an appeal was filed. Had it been the case of the respondent No.1 that he instructed his lawyer to make that statement in a panicked state of mind then obviously the remedy available to him was to file an application to the same Court seeking leave of the Court to withdraw the statement, but that was not done and appeal was filed. Perusal of the memorandum of appeal shows that the order has been challenged on 20 grounds and there is only one ground where something is said about statement being wrongly made. All other grounds in the memorandum of appeal challenge the order on merits. The only ground which is relevant in this regard is ground No.(xix) which is quoted above. Perusal of this ground shows that according to the respondent No.1, the learned Judge who was hearing the motion, put the respondent No.1 in box and gave only one option to him viz. to deposit the money or he will be arrested and therefore, he made the statement because of fear of arrest. The respondent No.1 has filed his reply in contempt petition which is dated 25th August 2006.

Paragraph 15 of that reply is relevant which reads as under :-

> "15. With reference to paragraph Nos.6 and 7 of the instant petition, I do not deny the contents therein, I however wish to point out the circumstances under which the said undertaking was given. I say that when the aforesaid matter was called out I was personally present in the Court. The learned Judge asked me to step into the box and stated that if the full amount was not paid in the Court I would face arrest. I say that as I was not aware of Court procedure and was scared by the aforesaid observations made by the Court as a result of which I was not in a proper frame of mind to understand the consequence and did not object to my counsel making the aforesaid statement which was due to bonafide and genuine lack of communication. I say that as a matter of fact the respondents were opposing the aforesaid contempt petition and question of there being any contempt which was unintentional or otherwise did not arise. I however say that the aforesaid statement got recorded due to a misunderstanding between myself and my counsel as also due to lack of

understanding of the Court procedure and the purport of the question put by this Hon'ble to me." (emphasis supplied)

. Perusal of the above paragraph shows that according to the respondent No.1, he was asked by the Judge to step into the box and he was told that if he does not pay the full amount in Court, he would face arrest. Therefore, he did not object when his counsel made the statement that the amount would be deposited. It is stated that the statement came to be recorded due to misunderstanding between him and his counsel. A comparison of the ground and the above paragraph shows that there is consistency of one fact viz. stepping of respondent No.1 into the box but according to the ground, the statement was made by the respondent No.1 himself while according to paragraph 15 of the affidavit in reply to the petition, it was made by the lawyer and due to confusion, the respondent No.1 could not object to it. So far as the affidavit filed in support of the notice of motion No.1060 of 2007 is concerned, it is paragraphs 27 and 28 of the said affidavit which are relevant. They read as under :-

"27. Upon the matter being called out, the Plaintiff's Advocate urged before the Court that the Defendants had concealed from the

Court the fact of transfer and misled the Court despite several opportunities being available for disclosure. It was argued that several pleadings had been filed but still this fact was deliberately concealed. The Court thereupon became very annoyed with my Advocate and me. In light of the fact set out above, I was unable to assist my Advocate and he was, in turn, unable to assist the Court. Both of us could not think clearly and panicked. We were then told in no clear terms that unless the sum of Rs.59 lakhs (being the sale consideration) was brought back, the Court would have no option but to order my immediate arrest.

28. Both of us panicked. The way we saw the matter then was that unless the Defendants agreed to deposit the sum of Rs.59 lakhs in Court, I would be arrested in the Court itself and taken to jail. I had never contemplated such a situation. The said office was of defendant Nos.2 and 3. I was not concerned with it. I did not know much and recollected very little. All I could understand was that the defendant Nos.2 and 3 had done something for which I would end up getting arrested.

> All this happened very quickly. Fearing my arrest I instructed my Advocate to inform the Court that the sum of Rs.59 lakhs would be deposited. On an enquiry from the Court on the time needed, I asked for 8 weeks. In these circumstances the order dated 22nd August 2005 came to be passed." (emphasis supplied)

. A comparison of ground in the memorandum of appeal and the affidavit referred to earlier filed in the contempt petition shows that it is nowhere alleged here that the respondent No.1 was asked to step into the box. So far as the statement is concerned, according to the averments in paragraph 28, the statement was made by the Advocate and it is the respondent No.1 who instructed the Advocate to make the statement whereas earlier version was that the Advocate made the statement but the respondent No.1 could not object to it and that the lawyer made the statement because of misunderstanding. Thus, there are material discrepancies and contradictions in the statements made about the same incident at different times by the respondent No.1. In my opinion, due to this contradictions, the version of the events as narrated by the respondent No.1 cannot be accepted. The statements that have been made by the respondent No.1 are in

relation to the proceedings in the Court and therefore, unless there is a very strong reason, the Court will have to go by the narration of the events as found in the order of the Court. I do not find any reason to believe that the statements came to be made by the respondent No.1 due to any panic or misunderstanding. So far as the case of the respondent No.1 that because the transfer of the property was effected by the respondent Nos.2 and 3, he was in no way responsible to communicate the fact either to the Court or lawyer is concerned, that is negatived by his own affidavit dated 22nd August 2005. In that affidavit, he states that he had informed his Advocate about the agreement and the conveyance and that it is the inadvertent mistake of his lawyer that he did not bring this fact to the notice of the Court. The only explanation that is given is that this affidavit was filed in a hurry. If the affidavit was filed in a hurry and if the affidavit contained a wrong statement, then immediate steps should have been taken to withdraw that affidavit. To this date, there is no application made for permission to withdraw the affidavit. This shows that the respondent No.1 does not give any thought before making incorrect statement on oath. If really the statement was made by the respondent No.1 by mistake or because of panic, then the only competent proceedings were to take out notice of motion in suit for permission to withdraw that

statement. That notice of motion really speaking should have been taken out immediately after the order was made but instead of taking out that motion, appeal was filed. Here again, the lawyer is blamed for giving wrong advice. In August 2006, even the appeal was dismissed holding that the appeal is not maintainable. Then at least a notice of motion should have been taken out for withdrawing the statement, but it was not taken out and again a lawyer is blamed for giving wrong advice that that can be done by filing reply in the contempt petition and ultimately notice of motion is taken out when the contempt petition is fixed for final hearing before the Court. The narration of these events shows that taking out of notice of motion No.1060 of 2007 is clearly an after thought and it was taken out only to avoid action being taken against the respondent No.1 for having committed contempt of this Court. Notice of motion therefore, in my opinion, is liable to be rejected. It is an admitted position that a statement was made by the respondent No.1 that an amount of Rs.59,00,000/- will be deposited in Court. If the respondent No.1 had bonafide made a wrong statement, he could have immediately deposited the amount and moved the Court for permission to withdraw the statement and also for withdrawal of the amount. It is evident that after having made the statement before the Court and prevented the Court from taking action against him, he

had no intention to deposit the amount. Therefore delaying tactics were adopted by the respondent No.1 and he also succeeded to the extent that till today, there is no action taken against him. The order in which the statement is recorded is dated 22th August 2005. An appeal was filed against that order. While that appeal was pending the present contempt petition was filed on 7th April 2006 i.e. more than Eight or Nine months after the order was made. It appears that the petitioner had served the respondents with this petition. When this petition came up before the Court for admission on 25th August 2006, an adjournment was sought on the ground that the appeal is pending and in that appeal a notice of motion has been taken out for stay of the order. The Court in the order dated 25th August 2006 has noted that the appeal has been filed nearly one year back, the notice of motion has also been taken out for stay of the order nearly one year back, but neither the appeal has been moved nor the notice of motion has been moved. Still the Court granted one week's time for obtaining stay of the order from the Appeal Court. It appears that it is only at this juncture that the Appeal Court was moved and the Appeal Court dismissed the appeal by order dated 28th August 2006. It is thus clear that the purpose of filing appeal, which was clearly not maintainable, was merely to cause delay. So far as the contention of the learned

counsel appearing for respondent No.1 that there is no undertaking given by the respondent No.1 is concerned, perusal of the order shows that there is a clear statement made before the Court to do a particular thing and it is only because of the statement that the Court has not taken any action, therefore for the breach of such a statement contempt petition would be maintainable. So far as the second submission that according to the allegation in the contempt petition, the respondent No.1 has committed breach of an order made by the Court when there is no such order of the Court is concerned, paragraph 7 of the petition shows that the petitioner has clearly stated that there was an undertaking given by the respondent No.1 to deposit the amount in Court and he has committed breach of that undertaking. The principal purpose of filing a petition is to put the respondent No.1 on notice of the allegation he has to face. If that is the purpose, then it is clear from the reply filed by the respondent No.1 that he had clearly understood the allegation that he has to face, therefore in my opinion, there is no substance in the submissions made. It is clear that the respondent No.1 has deliberately and wilfully not abided by the solemn undertaking given to this Court, relying on which the Court passed the order dated 22nd August 2005. It was submitted that the premises were transferred by the respondent Nos.2 and 3 and that the

order dated 22nd August 2005 also shows that the statement was made by the Advocate appearing for respondent Nos. 1, 2 and 3 and therefore proceeding only against the respondent No.1 is not proper. Perusal of the contempt petition shows that it was the case of the petitioner that the statement was made before the Court which is recorded in the order dated 22nd August 2005 was on behalf of respondent Nos.1, 2 and 3. The Court heard the matter for admission on 22nd September 2006. The Court, at that time, recorded the prima facie finding that the respondent No.1 has committed contempt of the Court by failing to deposit the amount and therefore, the Court issued show cause notice against the respondent No.1. It is recorded in the order dated 22nd September 2006 that the Advocate appearing for petitioner submitted that the undertaking was also given on behalf of the respondent Nos. 2 and 3 and therefore, a show cause notice should be issued to them also. The Court, however, adjourned the hearing to consider the question whether a show cause notice is to be issued against the respondent No.2 and 3 also. It appears that the Court heard the parties on that question on 17th November 2006 and passed an order on that date. Perusal of the order dated 17th November 2006 passed by this Court shows that according to the Court though the order dated 22nd August 2005 shows that the statement was made on behalf of all the respondents, however, in the

affidavit filed on behalf of the present respondent No.1 it is nowhere stated that the statement was made on behalf of the respondent Nos. 2 and 3 also. It was also noted that in the order, appearance of defendant Nos. 2 and 3 was also not shown and therefore, the Court recorded a finding that the undertaking was not given on behalf of respondent Nos. 2 and 3 and therefore, the Court declined to issue show cause notice against the respondent Nos.2 and 3. If it is the case of the respondent No.1 as was argued before me that the transfer was effected by defendant Nos.2 and 3 and money was taken by them, and therefore, the statement that was recorded in the order dated 22nd August 2005 was made on their behalf also, it was for the respondent No.1 to challenge the order dated 17th November 2006 passed in this petition whereby the Court, on recording the finding that the statement recorded in the order dated 22nd August 2005 is made only on behalf of respondent No.1, declined to issue show cause notice against the respondent Nos.2 and 3. So far as the issue whether the statement was made on behalf of respondent Nos. 2 and 3 also is concerned, that issue is closed because of the order dated 17th November 2006. In the absence of any challenge raised to that order, that question cannot be re-examined.

3. In the reply filed in show cause notice, in

the last paragraph, the respondent No.1 has tendered apology. I have found that the respondent No.1 had made a clear statement to the Court that he will deposit the amount in Court. If the apology tendered by the respondent was heartfelt and genuine, when I put it to the learned counsel appearing for respondent No.1 whether the respondent No.1 is willing to deposit the amount even at this late stage, he stated that the respondent No.1 is not in a position to deposit the amount. What is pertinent to be noted here is that the amount being deposited was not to be paid over to any party, but it was to remain in Court invested. Refusal of the respondent No.1 to deposit the said amount even at this late stage in Court shows that the apology tendered by the respondent No.1 is neither heartfelt nor genuine. Therefore, that apology cannot be accepted. I have heard learned counsel appearing for respondent No.1 on the aspect of sentence also. There is a clear failure to abide by the solemn statement made to the Court. I propose to pass an order imposing sentence because of the tendency of respondent No.1 to blame his lawyer for everything. At every stage, he has blamed his lawyer. What is pertinent to note is that the respondent No.1 is English knowing, the facts were known to him, he was in a position to correct any wrong statement which was made by the lawyer but he did not do it but whenever finding that the order is against him,

he blamed the lawyer. In this situation therefore, in my opinion, it will be appropriate to sentence the respondent No.1 to undergo imprisonment. In my opinion, sentencing the respondent No.1 to undergo imprisonment for a period of one month would be appropriate because even today, he is not willing to abide by the undertaking and deposit the amount in Court. I accordingly order. The respondent No.1 is also directed to pay fine of Rs.2,000/-. The respondent No.1 shall also pay as and by way of cost of this petition Rs.15,000/- to the petitioner. Notice of motion and the petition are disposed off.

4. At the request of the learned counsel appearing for respondent No.1, that part of the order which imposes sentence is stayed for a period of six weeks from today subject to the condition that within two weeks from today, the amount of cost and fine is paid.

. Parties to act on the copy of this order duly authenticated by the Associate / Private Secretary as true copy.

. Certified copy expedited.